United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7075

To be argued by
GILBERT H. WEIL, ESQ.

United States Court of Appeals

For the Second Circuit

Docket No. 76-7075

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs-Appellees,

against

WALTER W. BREGMAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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REPLY BRIEF FOR DEFENDANT-APPELLANT

I

Appellees have not refuted appellant's legal authorities.

Appellees deny the established doctrine described at pages 15-29 of defendant-appellant's brief (DB) that an unrelated lawyer, even where he has served in litigation as co-counsel or in association with a formerly related attorney, is not to be disqualified (under Canon 9) unless actual impropriety (Canon 4) has been demonstrated ("The simple answer to this is that it is just not so." Plaintiffs-appellees' brief (PB) page 17). However, nowhere do they find authority for that ipse dixit. They try to in Hull (idem), but offer

no accommodation within their argument for the fact that actual impropriety (disclosure of privileged information by the related to the unrelated attorneys) did exist (DB 25), and that this Court explicitly allowed for the related attorney to be represented by another, unrelated attorney in the absence of such actual impropriety (DB 26).

There is, in this case, neither averment nor evidence of actual impropriety; and it is within that framework that Bregman's right to be represented by the Weil firm is to be judged.

II

Appellees have not demonstrated the requisite actual, or even apparent, impropriety.

A. Without claiming or showing actual impropriety, plaintiffs seek to paint a picture of the Weil firm working closely with Randall on the very matter as to which he served Org as its counsel.

> A clearer case than this - of an exact switch of representation in the same matter on which the attorney had previously worked to take the other side of the case against a former employer and to work closely with the firm which was employed to handle the litigation - can

hardly be imagined (PB 16).

But:

1) There was no such "case against [the] former employer" until January 24, 1974. Although plaintiffs had attempted unsuccessfully to serve a complaint in that case on January 8, 1974, there was no assurance they would try again, once Bregman's suit against only Greene had been instituted. After January 8, 1974 (if even before) the Weil firm certainly did not work closely with Randall (DB 9 - 12, 30-36). At no time had it "represented him" (PB 11), a mis-statement that finds no support in the record.

By January 24, 1974, Bregman's complaint against Greene, as a sole defendant, had already been filed in the district court (DB 11). There can be no questioning of Bregman's right to be represented by the Weil firm against Greene (even now). Can it be maintained, then, that Org was free to balk that right by later bringing action of its own against Bregman, raising the same issues as in the Greene suit? By what logic or doctrine might Org, by its own act, retroactively subvert that which had been proper when done into something wrongful? Especially

inasmuch as the Org complaint raised no issue not previously involved in the litigation against Greene (infra), in which the Weil firm appeared with neither actual nor apparent impropriety as counsel of record for Bregman.

2) Even before January 8, 1974, litigation by Bregman had been foreseen against only Greene, to whom the Weil firm, and even Randall, owed no ethical allegiance (DB 10). That choice was not, as DB 12 would imply, "since neither Randall nor Weil had represented him before . . ."It was because of Weil's judgment that a suit might not properly lie against Org, inasmuch as Bregman did not possess the Greene option stock to tender to it, Greene having refused to transfer the shares to him; and that action against Greene for such refusal showed by far the better likelihood of success.

3) The Org versus Bregman litigation, possibly presaged by the form of complaint mailed by Org's lawyers to the Weil firm on January 8, 1974, posed only legal issues based upon written documents as to whose existence, completeness and content there was no inter-party controversy. (Attachment to petition for removal filed February 19, 1974;

11a-24a; 25a-28a.) The solitary issue of fact the district court found to be triable herein, breach of fiduciary duty, was not alleged in the complaint (11a-24a); the pleadings have not to this day been amended to incorporate it.

In short, there was no reason in such litigation as Org presented to be concerned over even a possibility of any material or pertinent disclosure of privileged knowledge; nor could such information, in any event, have been confidential against, or not independently known, to Bregman himself, without any access to Randall as a source. (DB 8, 30-31, 39.) * The Weil firm's position was far from one of apparent impropriety.

4) Even as to the breach of fiduciary duty contention there is not, with all due respect to the opinion of the district court, a true issue of fact as to which Randall might possess privileged knowledge. Apart from the demonstration to

* Plaintiffs try to fill this gap by reiterating that Randall had "drawn" or "prepared" Bregman's employment contract (e.g. PB 3, 5, 13), but that was not until after Bregman himself had drafted what it should contain, including the crucial paragraph 8, upon which this case hinges (DB 6). One need not rely upon Randall's own testimony that his role was no more than editorial. Mere comparison of Bregman's draft with the final contract is all that is needed to substantiate that, especially with respect to paragraph 8 (DB 6, 44-47).

that effect made at DB 37-39, it may also be noted that:

a) Bregman was not told about the Greene option until after August 31, 1972, when it had been consumated (NBN Dep. 37) so that he could not before that have slyly or guiltily withheld from Org a warning of his rights under its own earlier contract with him. (Exactly the same rights applied, as well, to all the other shares he had previously purchased from Org itself and its major officers [PB 2, 3]);

b) Under no circumstances could it have been possible for Bregman to "[gain] what is unfair" or "[obtain] a harsh advantage" under his employment contract unless and until he was fired by Org (PB 1-2). Surely no "fiduciary duty" (PB 8) could go so far as to impose on Bregman a duty to anticipate that he would be discharged and <u>thereby</u> attain an "unfair" and "harsh advantage."

B. In the main, plaintiffs' arguments are posited upon a single premise, succinctly represented by their sentence, "The association [of Randall and the Weil firm] was tainted from the beginning." (PB 21.)

The "beginning", so far as the Weil firm is concerned, was in October of 1973, at which time the matters in controversy between Bregman and Org did not involve the subject of the within case (DB 7-9). If, therefore, there were any beginning "taint" that is presently pertinent it would have to have originated later than that; and there was no possible such an occasion before Org chose to interject itself into what had until then been a matter between only Bregman and Greene (supra).

Thus, if a "[taint] from the beginning" there were, it could have dated only from January 8, 1974 at the earliest. Nothing that took place between Randall and the Weil firm from that time on can be, or has been, shown to be tainting (DB 11-12, 29-30).

Further, there was no impropriety, real or illusory, in the Weil firm's conduct with respect to the disputes that did exist when it first entered the picture. Bregman's letter of October 8, 1973 to Mr. Norman (Px5) plainly shows he knew all there was to know about them (DB 8), and their resolution turned on open documentary evidence, not upon any intangible or other information received by Randall from Org under a cloak of privilege (idem).

III

Bregman's right to counsel of his choice.

Plaintiffs pontificate "The right to choose counsel is subordinate to the court's protection of the adverse litigants and of the public." (PB 23.) Plaintiffs' half of that dichotomy is sham. Nowhere throughout these lengthy proceedings have plaintiffs been able even to claim, much less demonstrate, how they (or the public) might be harmed by the Weil firm's continued representation of Bregman. As indisputably shown earlier, there has been no allegation or proof of actual impropriety; and the case turns upon documentary or other evidence of which Bregman is, and any successor attorneys he might turn to would be, well aware, including his own "state of mind." (DB 37-38) Plaintiffs have nothing to fear; and, in truth, they do not fear, But it is a different situation for Bregman; and plaintiffs know it. More than once their attorney has voiced a strong conviction that if Bregman, living and working in California, is forced to replace the Weil firm he will go no further with this case.

Which may be the real reason why plaintiffs are pressing so hard.

Dated: New York, New York
May 25, 1976

Respectfully submitted,

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